Supreme Court, U.S.
FILED

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No. _____

IN THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 2002

CAROLYN H. MCKENZIE,

PETITIONER

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether to establish a prima facie case of gender discrimination a female employee must show that a male was promoted during the time when she was denied any such promotion.

2. Whether the fact that a Federal Agency has undergone "reorganizations" requires a finding that male supervisors promoted to a higher grade before the reorganizations are not similarly situated with their female counterparts with identical duties who are retained in a lower grade.

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

a. Carolyn H. Mckenzie, Plaintiff-Appellant;

b. Anthony J. Principi, Secretary of Veterans Affairs, Defendant-Appellee;

c. Richard L. Swick, Attorney for the Plaintiff-Appellant;

d. Michael A. Krasnow, Assistant United States Attorney, for the Defendant-Appellee

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit, *McKenzie v. Principi*, 54 Fed.Appx. 1, 2002 WL 31866250 (D.C.Cir.), is unpublished, and is reproduced in the attached Appendix ("App") at 1a. The Judgment and Memorandum Opinion of the United States District Court for the District of Columbia, *McKenzie v. Principi*, Civil Action No. 01-405-A CA 99-0257 (RCL), is unreported, and is reproduced in the Appendix at 9a.

JURISDICTION

This Court has jurisdiction to review the *per curiam* decision of the United States Court of Appeals for the District of Columbia Circuit entered on December 20, 2002, to affirm summary judgment against Petitioner, by a Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The full text of each statute below is supplied in the Appendix.

Civil Rights Act of 1964, as amended.

42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer --

(1) to ... discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, [or] sex ...

STATEMENT OF THE CASE

Procedural History

Petitioner, Carolyn H. Mckenzie, Plaintiff-Appellant below, brought an action for unlawful discrimination on the basis of gender and race pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. §§ 206(d) *et seq.* The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and § 707 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-5 *et seq.* On March 21, 2000, the district court dismissed petitioner's Equal Pay Act claims pursuant to Federal Rule of Civil Procedure 12 (b)(1) and 12 (h). She has not appealed that order. On July 3, 2001, the District Court issued a memorandum opinion and order granting respondent's motion for summary judgment and dismissing appellant's remaining claims. *McKenzie v. Principi,* Civ.A.No. 99-0257 (D.C. July 2, 2001), App. at 9a. The District Court's memorandum opinion argued that summary judgment was proper because Ms. McKenzie would be unable to establish a prima facie case under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), framework, because she could not show there were any employees promoted who were outside of her protected class (black-female). *McKenzie v. Principi,* Civ.A.No.99-0257 (D.C. July 2, 2001), App. 15a-18a.. The gravamen of the district court's conclusion was that the promotions of appellant's male counterparts occurred before various reorganizations within the Department of Veterans Affairs, and, therefore, no comparator to appellant could be established. Ms. McKenzie appealed.

By its unpublished *per curiam* decision on June 28, 2002, the United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's decision on the same grounds. (App. 1a.) Plaintiff-Appellant McKenzie now petitions this Court.

Relevant Facts

Petitioner, Carolyn McKenzie, is an African-American female who began her career at DVA in February 1993 as a GS-11 Computer Systems Analyst in the Veterans' Affairs Central Office ("VAC"). The VAC ultimately became known as the Information Telecommunications System Service ("ITSS"), the name by which it is currently known. This initial position provided a career ladder to the GS-12 level. A career ladder position is one in which an employee is not required to compete with others to attain a promotion to the next GS level. Effective March 6, 1994, Ms. McKenzie was promoted to the position of Operations Shift Supervisor, which was a GS-12 level position that was targeted for the GS-13 level. While three of her four male counterparts served at the GS-13 level, Ms. McKenzie was the only female GS-12 Operations Shift Supervisor. Two of these men were promoted prior to Ms. McKenzie's promotion, on August 9, 1992 and August 6, 1993, one retired in 1995.[1] ITSS's practice with regard to the promotion of Operation Shift Supervisors for the male supervisors was to allow them to

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[1]A fourth male was ultimately laterally transferred into a GS-13 position while Ms. McKenzie was out on sick leave. This lateral transfer was into a vacant position that was previously a GS-12 position.

progress to the GS-12 level as was done with Ms. McKenzie and then to upgrade the position and open it for competition. Invariably, the incumbent was the best qualified for the position and was therefore selected. Nothing in the reorganizations precluded ITSS from upgrading Ms. McKenzie's position so that it was graded at the same level as the male supervisors who had the same duties.

Department-wide reorganizations designed to address GS-14/15 level positions, not GS-13, occurred between October 1994 and January 1997 at DVA. As a result of the reorganizations, ITSS lost approximately 55 employees, decreasing from 100 to 45 employees. Ms. McKenzie remained as the only GS-12 Operations Shift Supervisor as early as the beginning of 1995, as all four of her male counterparts had been promoted to the GS-13 level at this time.

Upon satisfying the one-year, time-in-grade requirement as a GS-12 employee, Ms. McKenzie had several discussions about a possible promotion with her second-line supervisor, Patricia McCully, who promised to assist her in obtaining the promotion. Ms. McCully was succeeded by Joe Walper in May 1995, and Mr. Walper repeatedly told Ms. McKenzie that he could not do anything to assist Ms. McKenzie in attaining a promotion. However, Mr. Walper's immediate supervisor, Kenneth Thomas, testified that if Mr. Walper recommended such a promotion, which he never did, Ms. McKenzie could be promoted. In a seeming contradiction, Mr. Walper stated several times to both Ms. McKenzie and Reginald Sanders, one of Ms. McKenzie's male colleagues who was promoted to a GS-13 position in 1993, that Ms. McKenzie was doing the same work as the GS-13 Supervisor and that he believed she should be promoted to GS-13.

Mr. Thomas and Mr. Sanders both discussed promoting Ms. McKenzie with Lorraine Pertino, Mr. Thomas's immediate supervisor. While Ms. Pertino indicated that Ms. McKenzie's position description only went to GS-12, she admitted that Ms. McKenzie was "tracked for a GS-13." The statements made to Ms. McKenzie by Mr. Walper that he could do nothing to promote her to a GS-13 position because of reorganizations thus find no support in the record evidence.

Ms. McKenzie worked the swing shift until July/August 1996, which authorized her to receive a substantial pay differential. Ms. McKenzie was also the only Computer Specialist working the swing shift for approximately two and one-half years. However, Mr. Walper reassigned Ms. McKenzie to the day shift in the summer of 1996, claiming that he needed her talents on the day shift, and assigned one of her male contemporaries to the swing shift in her place. This reassignment caused Ms. McKenzie to suffer a reduction in pay, and it also meant that a male, GS-13 counterpart was put in the higher paying position she previously held while Ms. McKenzie continued at a lower grade level than her male counterparts who did the same job.

District Court and District of Columbia Circuit Court Holdings At Issue

In its memorandum opinion supporting its grant of summary judgment, the District Court acknowledged nearly all of the factual claims above. (App. 10a-13a.) However, the District Court held that Ms. McKenzie would be unable to establish a prima facie case under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973),

framework, because she could not show there were any employees promoted who were outside of her protected class (black-female). *McKenzie v. Principi,* Civ.A.No.99-0257 (D.C. July 2, 2001) , App. 15a - 21a. The gravamen of the district court's conclusion was that the promotions of Ms. McKenzie's male counterparts occurred before various reorganizations within the Department of Veterans Affairs, and, therefore, no comparator to appellant could be established. *Id.* at 18a - 21a.[2] The district court failed to address the thrust of Ms. McKenzie's complaint which was that respondent's reorganizations did not preclude it from upgrading Ms. McKenzie's Operations Shift Supervisor position to the GS-13 level just as it had done for her male counterparts. Her male counterparts were then promoted to the GS-13 level because they had the inside track when they competed for the upgraded position which embraced the very duties that they had been performing. The district court thereby allowed respondent to open a loophole in Title VII by manipulating the technical qualifications for positions to keep qualified employees from advancing to higher level positions. Ms. McKenzie established that she was "qualified" for promotion even though she could not satisfy the technical barriers erected by the agency. She has demonstrated that she has consistently performed duties identical to males who were assigned at the GS-13 level and, therefore, was qualified for promotion in the same manner as her male coworkers had been. Instead of considering Ms.

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[2]The district court also addressed a more recent promotion to GS-13 of Celeste Matthews, who like Ms. McKenzie is a black female. App. 20a. However, Ms. McKenzie does not challenge that promotion in that Ms. Matthews was not an Operations Shift Supervisor and had not been promoted by the device of upgrading her position, as had occurred with the male Shift Supervisors.

McKenzie's evidence that she had been denied promotion because the discriminatory manner that respondent decided not to upgrade her promotion, the district court allowed the respondent to dodge responsibility by denying Ms. McKenzie the same opportunity to compete for an upgraded position as had been granted her male counterparts.

The district court also concluded that the various reasons proffered by the appellee -- that there was a hiring freeze and that reorganizations precluded appellant from being promoted to the next higher grade -- successfully rebutted a prima facie case by articulating several "legitimate non discriminatory reasons" for not recommending or promoting Ms. McKenzie outright. The district court refused to examine evidence that neither the reorganization nor the freeze precluded the upgrading of Ms. McKenzie's position. Such evidence raised factual issues which would have permitted a reasonable jury to conclude that respondent's proffered reasons were a mere pretext to cover a discriminatory animus.

On appeal, the unpublished District of Columbia Circuit opinion, affirmed *per curiam* the District Court's conclusion that to establish a prima facie case, Ms. McKenzie was obliged to show that the reorganizations were motivated by her gender. The Court of Appeals did not address Ms. McKenzie's evidence that the reorganizations did not affect Gs-13 positions and, as such, provided no bar to her position being upgraded in the same manner as her male counterparts.

Conflicts With Supreme Court and Other Circuit Court Precedents

The holdings below depart from decisions in other circuits which establish that whether two employees are similarly situated ordinarily presents a question of fact for the jury. *See Taylor v. Brentwood Union Free Sch. Dist.*, 143 F.3d 679, 684 (2d Cir.1998) (explaining that jury was asked to decide whether the plaintiff was treated differently from similarly situated white employees), *cert. denied*, 525 U.S. 1139, 119 S.Ct. 1027, 143 L.Ed.2d 37 (1999). The district court's discussion of this subject set forth no legal standard for determining who is a similarly situated employee, and instead confined itself to pointing out factual differences between Ms. McKenzie and the male supervisors with whom she sought to compare herself. When considering whether a plaintiff has raised an inference of discrimination by showing that she was subjected to disparate treatment, the plaintiff must show she was "similarly situated in all material respects" to the individuals with whom she seeks to compare herself. *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir.1997).

In *Shumway*, the Second Circuit adopted without discussion the Sixth Circuit's "all material respects" standard. *Id.* (*citing Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir.1992)), *but see also McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n. 11, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976) ("precise equivalence in culpability between employees is not the ultimate question"); *Ricks v. Riverwood Int'l Corp.*, 38 F.3d 1016, 1019 (8th Cir.1994) (employing comparable seriousness standard); *McAlester v. United*

Air Lines, Inc., 851 F.2d 1249, 1261 (10th Cir.1988) (stating that in a disparate treatment case the fact that other employees did not commit the exact same offense as the plaintiff does not prohibit consideration of their testimony as long as their acts were of comparable seriousness).

The Sixth Circuit itself has backed away from a rigid interpretation of *Mitchell*, cautioning that such precedent should not "invite a comparison between the employment status of the plaintiff and other employees in every single aspect of their employment.... Courts should not assume ... that the specific factors discussed in *Mitchell* are relevant factors in cases arising under different circumstances." *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir.1998). Instead, courts should make an "independent determination" of the factors relevant to each case. *Id.* What constitutes "all material respects" therefore varies somewhat from case to case.

In determining whether two employees are similarly situated a court must look at all relevant factors, the number of which depends on the context of the case. *Spath v. Hayes Wheels Int'l-In., Inc.*, 211 F.3d 392, 397 (7th Cir.2000). For example, in disciplinary cases--in which a plaintiff claims that he was disciplined by his employer more harshly than a similarly situated employee based on some prohibited reason--a plaintiff must show that he is similarly situated with respect to performance, qualifications, and conduct. *Byrd v. Ronayne*, 61 F.3d 1026, 1032 (1st Cir.1995). This normally entails a showing that the two employees dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their

conduct or the employer's treatment of them. *Mitchell v. Toledo Hosp.*, 964 F.2d at 583. In a failure to transfer case some of these factors--like the severity of the infractions--are not relevant, although the same general comparisons must be made. As to the relevant factors, an employee need not show complete identity in comparing herself to the better treated employee, but she must show substantial similarity. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d at 352. In RIF cases plaintiffs were required to show at a minimum that the retained or transferred younger employees possessed analogous attributes, experience, education, and qualifications relevant to the positions sought, and that the younger employees obtained the desired positions around the same time as the RIF. *Biolchini v. General Elec. Co.*, 167 F.3d 1151, 1154 (7th Cir.1999).

There is a split in the circuits regarding the District Court's holding that to estbalish a prima facie case under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) a plaintiff must show that the male employees were promoted during the same time period that she was denied promotion. Nearly every Court of Appeals to consider the issue has agreed that the fact that an employer replaces a plaintiff with a person from within the same protected class is not, by itself, grounds for dismissing a Title VII claim. *See Stella v. Mineta*, 284 F.3d 135 (D.C.Cir. 2002); *Perry v. Woodward*, 199 F.3d 1126, 1136-41 (10th Cir.1999), *cert. denied*, 529 U.S. 1110, 120 S.Ct. 1964, 146 L.Ed.2d 796 (2000); *Nieto v. L & H Packing Co.*, 108 F.3d 621, 624 & n. 7 (5th Cir.1997); *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 158-59 (7th Cir.1996)(per curiam); *Jackson v. Richards Med. Co.*, 961 F.2d 575, 587 n. 12 (6th Cir.1992); *Cumpiano v. Banco Santander P.R.*, 902 F.2d 148, 154-55 (1st Cir.1990); *Walker v. St. Anthony's Med. Ctr.*, 881 F.2d 554, 558

(8th Cir.1989); *Meiri v. Dacon*, 759 F.2d 989, 995-96 (2d Cir.), *cert. denied*, 474 U.S. 829, 106 S.Ct. 91, 88 L.Ed.2d 74 (1985); *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1534-36 (11th Cir.1984). However, the Fourth Circuit has come to a different view. *See Brown v. McLean*, 159 F.3d 898, 905 (4th Cir. 1998) ("In order to make out a prima facie case of discriminatory termination, a plaintiff must ordinarily show that the position ultimately was filled by someone not a member of the protected class."), *cert. denied*, 526 U.S. 1099, 119 S.Ct. 1577, 143 L.Ed.2d 672 (1999).

But the approach adopted by the Disrict Court and the Fourth Circuit finds no support in *McDonnell Douglas*. In *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n. 44, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), this Court explained the function served by the *McDonnell Douglas* formula. The Court stated that, under *McDonnell Douglas*, a plaintiff must show that his rejection is not attributable to "the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought." *Id.* The Court further explained that "[e]limination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one." *Id.* The Court did not discuss the factor relied on by the District Court, and that factor is not relevant to the analysis set forth by the Court in *Teamsters*.

The point was made even more clearly in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996), an age discrimination case. In *O'Connor*, a unanimous Court found the fact that the "plaintiff was

replaced by someone outside the protected class" not to be a "proper element of the *McDonnell Douglas* prima facie case." *Id.* Courts of Appeals have applied *O'Connor* to the sex discrimination context. In *Pivirotto v. Innovative Systems, Inc.*, 191 F.3d 344, 347 (3d Cir.1999), the Third Circuit "join[ed] seven other circuits in holding that a plaintiff claiming discriminatory firing need not prove, to make out a prima facie case, that she was replaced by someone outside the relevant class" (footnote omitted). The *Pivirotto* court noted that an important function of the prima facie case is to weed out the most common lawful reasons for the defendant's action, such as the plaintiff's lack of qualifications or the elimination of the position altogether. *Id.* at 352 (*citing Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)). It also pointed out that even if a plaintiff was replaced by someone within her class, she could still demonstrate that the employer treated her worse than others because she was a member of the protected class. *Id.* at 353. She may have been "treated differently from similarly situated male employees." *Id.* at 353-54.

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE DISTRICT OF COLUMBIA CIRCUIT'S HOLDING THAT MS. MCKENZIE COULD NOT ESTABLISH A PRIMA FACIE CASE OF GENDER DISCRIMINATION WITHOUT SHOWING THAT A MALE SUPERVISOR WAS PROMOTED DURING THE TIME WHEN SHE WAS DENIED ANY SUCH PROMOTION DIRECTLY CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT COURT PRECEDENTS

The District of Columbia Circuit dismissed Ms. McKenzie's

gender discrimination claim for failure to establish a prima facie case of discrimination. The Court held that because Ms. McKenzie did not identify similarly situated employees who were promoted during the time she sought to be promoted, she did not establish a prima facie case of discrimination. This holding conflicts with prior decisions of this Court and decisions in other circuits that establish a prima facie case of gender discrimination, a plaintiff must establish that "(1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination." *Brown v. Brody*, 199 F.3d 446, 452 (D.C. Cir. 1999); *see also Stella v. Mineta*, 248 F.3d 135, 145 (D.C. Cir. 2002). Upon establishing a prima facie case of discrimination, DVA would then bear the burden of proving that its reorganizations were not in fact pretexts to sex discrimination against Ms. McKenzie. *See McDonnell-Douglas Corp. v. Green*, 411 U.S. at 802 (explaining that the complainant bears the initial burden of establishing a prima facie case of discrimination, and upon such a showing, the employer then bears the burden of articulating a non-discriminatory reason for its action(s) against the employee).

Generally, in establishing a prima facie case of discriminatory non-promotion, the plaintiff must show that similarly qualified employees who were not members of the protected group were promoted when plaintiff's request for promotion was denied; however, no hard and fast rule should be applied. Instead, the court should consider "the rules and customs of a particular employer" in determining an individual's qualification for promotion. *Bundy v. Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981). Furthermore, "there can be no absolute precise and uniform time period before and after the denial of the complainant's promotion during which plaintiffs

must show that similarly qualified nondisadvantaged employees were promoted." *Id.* Instead of following this case by case and more flexible time determination, the District of Columbia Circuit determined that Ms. McKenzie could not establish a prima facie case of discrimination because of the timing of the promotions of her male counterparts. In making its determination, the District Court Circuit failed to recognize the two types of promotion cases, both of which are implicated in Ms. McKenzie's situation. As discussed in *Cones v. Shalala*, 199 F.3d 512, 516-17 (D.C. Cir. 2000),

> One [type of promotion case] concerns employees like Cones who claim to have been denied promotions to vacant positions. In such cases, the relevant inquiry is controlled by the precise terms of *McDonnell Douglas*: Was the plaintiff rejected for the position and a person outside of his protected class selected? As we said in *Kolstad*, "[w]here sex discrimination in promotion is alleged, a plaintiff proves her prima facie case by showing that she is female, that she was refused a position for which she applied and was qualified, and that the employer filled the position with a male." 108 F.3d at 1436; *see also Barbour v. Merrill*, 48 F.3d 1270, 1276 (D.C. Cir. 1995).
>
> The other type of promotion case involves employees denied increases in pay or grade. In such cases, the traditional *McDonnell Douglas* test does not fit. As we explained in *Bundy v. Jackson*, 641 F.2d 934, 951 (D.C. Cir. 1981), a case in which the plaintiff sought an increase in her grade based on years of employment, "the literal *McDonnell* formula . . . designed for a claim of discriminatory refusal to hire . . . does

> not precisely apply to a claim, like Bundy's, of discriminatory refusal *to promote*." *Id.* We therefore "adjust[ed] the *McDonnell* formula" to ask whether a similarly situated person outside of Bundy's protected class requested and received the benefit she sought. *Id.*
>
> In this case, the district court erred by applying the *Bundy* test, designed expressly for denials of pay or grade increases, to Cones' *McDonnell Douglas*-controlled non-selection claim, where the only relevant question is whether Cones was rejected for the position and a white person selected. It matters not whether the person ultimately selected was promoted to that position, hired from a pool of outside candidates, or, as in this case, laterally transferred. Requiring plaintiffs like Cones to establish that a similarly situated person had been promoted into the position would create a truly anomalous situation. An agency hiring an external candidate would be liable under Title VII only to other external candidates that it failed to hire. An internal candidate seeking a promotion to that position could never establish a prima facie case because the person selected would not have been promoted to the position. Surely the *McDonnell Douglas* prima facie showing was not intended to create this absurd outcome.

Cones, 199 F.3d at 516-17.

Ms. McKenzie's petition involves both the traditional *McDonnell-Douglas* non-promotion and the *Bundy* non-promotion, as other similarly situated male employees were promoted before Ms.

McKenzie was eligible for such a promotion and because another male was laterally transferred while Ms. McKenzie was out sick but when she was qualified for a promotion to the GS-13 level she was denied the promotion. Therefore, the Court must consider whether Ms. McKenzie established a prima facie case of discrimination under both the *McDonnell-Douglas* and *Bundy* tests, not simply the *McDonnell-Douglas* test.

The District of Columbia Circuit's determination that Ms. McKenzie could not identify similarly situated employees who were promoted is in direct contradiction to its own decision in *Stella v. Mineta*, where it held that "a plaintiff in a discrimination case need not demonstrate that she was replaced by a person outside her protected class in order to carry her burden of establishing a prima facie case." *Stella*, 284 F.3d at 146. Furthermore, because of the different work environments that may arise, courts must apply both a flexible definition of "prima facie case" and of the allocation of burden of proof. *McDonnell-Douglas Corp.*, 411 U.S. at 802. Petitioner agrees that "mere speculation" offered to refute a legitimate, non-discriminatory reason for an employer's actions does not create a genuine issue of material fact. However, when evidence indicates contradictory information exists as to why a certain action was taken, a genuine issue of material fact exists and must survive summary judgment.

Under the elements outlined in *Brody* and *Stella* for establishing a prima facie case of discrimination, Ms. McKenzie simply had to show she belongs to a protected class, she experienced an adverse employment action, and that the adverse "action gives rise to an inference of discrimination" to establish a prima facie case.

Brown, 199 F.3d at 452. Ms. McKenzie is a member of a protected class, as she is an African-American woman. Ms. McKenzie experienced an adverse employment action as she was not promoted when individuals with the same job duties as Ms. McKenzie were promoted. *See Stella*, 284 F.3d at 146 (stating that "[t]here is no question that failure to promote is an 'adverse action' for purposes of the prima facie case."). The evidence clearly indicates that Ms. McKenzie was denied promotion to the GS-13 level while two male supervisors, both with duties equivalent to Ms. McKenzie's, did receive such a promotion. Furthermore, when Ms. McKenzie was forced to vacate her position because of an illness, another male supervisor, Allan Bland, was laterally transferred into the position at the GS-13 level. DVA asserted that the numerous reorganizations it underwent caused ITSS to operate differently and precluded Ms. McKenzie from being promoted. DVA thus argued that its disparate treatment of Ms. McKenzie was not illegal because it claimed that, as a result of the reorganizations, Ms. McKenzie was not similarly situated with her male counterparts. However, at a minimum, a plaintiff who is performing the same duties as her male counterparts raises a question of material fact regarding whether the historical fact of reorganizations warrants a determination that she is not similarly situated.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE DISTRICT OF COLUMBIA CIRCUIT'S DECISION, THAT SUPERVISORS WHO WORK IN THE SAME OFFICE AND DO THE SAME JOB ARE NOT SIMILARLY SITUATED DIRECTLY CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT COURT PRECEDENTS

The District of Columbia Circuit held that because Ms. McKenzie's male counterparts were promoted before the reorganizations, she could not establish a prima facie case of discrimination unless she demonstrated that the reorganizations undertaken as a pretext for gender discrimination. This holding creates a new rule that allows an employer an opportunity to discriminate against minority employees by simply alleging it has business reasons to reorganize. However, for a position graded at a specific level to exist, the duties associated with the position must be

at the designated level. Ms. McKenzie shared the same duties as her male counterparts, and all of those males were promoted to GS-13 positions while Ms. McKenzie was not. If the job duties of the males were properly graded at a GS-13 level and they were the same as Ms. McKenzie's duties, it follows that Ms. McKenzie's job duties were also at a GS-13 level. In the event that DVA managers determined that the reorganizations caused Ms. McKenzie's duties and those of her male colleagues to be below a GS-13 level, those managers were required to down-grade the positions classified at the GS-13 level, which in this situation were those positions held by the male managers. *See* 5 U.S.C. 5112(a)(3), (4) (authorizing the Office of Personnel Management to change a position's grade when facts warrant such a change). No such down-grade occurred here, even though the duties of Ms. McKenzie and her male counterparts were all equal, and therefore below the GS-13 level. From this alone, a jury could determine that the DVA reorganizations which precluded Ms. McKenzie from attaining the GS-13 level, unlike her male counterparts, were simply pretexts for discrimination against Ms. McKenzie because of her sex.

Reorganizations may be undertaken by employers from time to time for a number of reasons, and Ms. McKenzie has not challenged the possibility of such reorganizations to simplify or increase the efficiency of operations. If the reorganizations were only used to increase efficiency or a similar reason, Ms. McKenzie could not question DVA's actions. However, the DVA's reliance on the reorganization(s) as an excuse for not promoting Ms. McKenzie to a GS-13 position and increasing her pay accordingly is not simply a means of simplifying or making operations more efficient. The mere fact that there was a reorganization does not explain why Ms. McKenzie's position should be graded lower than that of male colleagues performing the same job. That is not permissible in any context. Ms. McKenzie as not contended that the reorganizations were motivated by discriminatory reasons, she agrees the DVA needed to streamline. However, the mere fact that the streamlining was necessary does not mean that a jury could not conclude that DVA's claim that the reorganizations warrant treating Ms. McKenzie differently than her male counterparts is a mere pretext for discrimination against Ms. McKenzie.

Conclusion

This case presents a departure from the established procedures for establishing a prima facie case under *McDonnell Douglas* which have been embraced by the District Court and the Fourth Circuit as well continuing confusion in circuit courts regarding when employees in a disparate treatment discrimination case are similarly situated. Petitioner respectfully requests this Court grant the writ of certiorari to resolve these issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard L. Swick, attorney for Petitioner do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the Petition for Writ of Certiorari to Michael A. Krasnow, Esq., Special Assistant U.S. Attorney, 555 Foruth Street, Room 11-440, Washington, D.C. 20530 on March 20, 2003.

Richard L. Swick

Appendix

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

Carolyn H. MCKENZIE, Appellant,
v.
Anthony J. PRINCIPI, Secretary of Veterans Affairs, Appellee.
No. 01-5271.
Dec. 20, 2002.

Before HENDERSON, TATEL and GARLAND, Circuit Judges.

JUDGMENT

PER CURIAM.

This case was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments by counsel. For the reasons set out in the accompanying memorandum, it is

ORDERED that the district court's opinion and order of July 2, 2001 be affirmed.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See Fed. R.App. P. 41(b); D.C.Cir. Rule 41.

MEMORANDUM

Carolyn H. McKenzie seeks reversal of the district court's July 2, 2001 opinion and order granting summary judgment for the defendant, Anthony J. Principi, Secretary of Veterans Affairs, on McKenzie's claims of gender and race discrimination. McKenzie, a

black female employee of the Department of Veterans Affairs ("DVA"), brought this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq., alleging that she had been discriminated against on the basis of sex and race by not being promoted to the GS-13 grade level.

As to McKenzie's sex discrimination claim, the district court held that McKenzie failed to establish a prima facie case of discrimination because she failed to demonstrate that similarly situated male employees were promoted to the GS-13 grade level during the time she was eligible for a similar promotion. The district court further held that, even if McKenzie had established a prima facie case of sex discrimination, she nonetheless failed to discredit the DVA's legitimate, non-discriminatory reason for her non-promotion--reorganizations within the DVA--as mere pretext. With respect to McKenzie's race discrimination claim, the district court held that McKenzie failed to establish a prima facie case of discrimination because she failed to show that any similarly situated non-black employees were promoted to the GS-13 level during the time she was eligible for a similar promotion.

On appeal, McKenzie argues that the district court erred in granting the defendant's motion for summary judgment on her claim of sex discrimination. [FN1] Because McKenzie offered no evidence demonstrating that the defendant's articulated reason for her non-promotion was pretextual, leaving no genuine issue of material fact in dispute, we affirm the district court's grant of summary judgment.

FN1. McKenzie does not discuss her race discrimination claim in either of her briefs before the court. Thus, by failing to brief the issue, McKenzie has waived her race discrimination claim. See Democratic Cent. Comm. of Dist. of Columbia v. Washington Metro. Area

Transit Comm'n, 485 F.2d 786, 790 n. 16 (D.C.Cir.1973)(where petitioner offers "no argument" whatsoever in support of certain issues on appeal, court will decline to consider them).

I.

McKenzie began working at the DVA in 1993 as a computer specialist at the GS- 11 grade level. JA 31. This position was a "career ladder" position ending at the GS-12 grade level. Pl.'s Ex. 2, McCully Dep. at 21 [JA 119]. An employee in a career ladder position is not required to compete with others in order to obtain a promotion to the next GS grade level until the employee attains the so-called "journeyman" level, i.e., the level at which the career ladder ends. Def. Ex. 14, Walper Aff. at 8. In March 1994, the DVA promoted McKenzie to operations shift supervisor, a GS-12 position "targeted" for the GS-13 grade level. Def.'s Ex. 1, Pl.'s Dep. at 27-29 [JA 131-33]; Pl.'s Ex. 2, McCully Dep. at 29-30 [JA 122-23]. Unlike a career ladder position, a targeted position requires the incumbent employee to compete with other employees in order to obtain a promotion to the targeted grade level. *3 Pl.'s Ex. 2, McCully Dep. at 29-30 [JA 122-23]. McKenzie's department, the Information Telecommunications Systems Service ("ITSS"), has a policy of posting targeted promotions for all employees, even if an incumbent employee already performs that job at a lower GS grade level. Pl.'s Ex. 2, McCully Dep. at 24-25, 29 [JA 120-22]. If the incumbent fails to win the promotion, he is given different job responsibilities. Id. at 25, 29 [JA 120, 122].

Beginning in October 1994, the DVA underwent a series of reorganizations designed to streamline the organization's operations and to reduce its personnel costs. JA 72-98. The reorganizations affected computer operations throughout the DVA and led to a reduction in ITSS's activities. Def.'s Ex. 10, Pertino Dep. at 44. As a

result, the DVA downsized ITSS from over 100 employees (as of 1993) to 45 employees (as of 2000). Def.'s Ex. 1, Pl.'s Dep. at 133 [JA 148].

McKenzie initially worked with four other operations shift supervisors. Def.'s Ex. 1, Pl.'s Dep. at 30. When McKenzie started her position as an operations shift supervisor, before the mid-1990s reorganizations, three of McKenzie's coworkers--Arthur Brooks, Reginald Sanders and Andy Stasny--had already attained the GS-13 grade level through the normal competition process. Id. Other than McKenzie, only Wade Wallace worked as an operations shift supervisor at the GS-12 grade level. Id. After McKenzie began working as an operations shift supervisor, a sixth individual--Allan Bland--laterally transferred into ITSS as a GS-13 operations shift supervisor. Pl.'s Ex. 8, Bland Aff. at 3. Like Brooks, Sanders and Stasny, Bland had obtained the GS-13 grade level through the competition process, but did so in another DVA department. Id. at 4. Brooks, Sanders, Wallace and Bland are all black males. Def.'s Ex. 1, Pl.'s Dep. at 30, 48. Stasny is a white male. [FN2] Id. at 30.

FN2. At the time of McKenzie's lawsuit, only four operations shift supervisors remained: Bland, Brooks, McKenzie and Sanders. Stasny retired sometime in 1995, Def.'s Ex. 1, Pl.'s Dep. at 46 [JA 134], while Wallace was transferred from ITSS to another DVA department in either 1995 or 1996. Compare Def.'s Ex. 1, Pl.'s Dep. at 46 (Wallace transferred in 1996) with Def. Ex. 14, Walper Aff. at 10 (Wallace transferred in 1995).

In March 1995, McKenzie first became eligible to compete for a promotion to the GS-13 grade level. Id. at 98 [JA 138]. When McKenzie approached her immediate supervisor, Joe Walper, to inquire about a promotion, however, Walper told McKenzie that his "hands [were] tied" because of an informal hiring freeze begun as a

result of the reorganizations. Id. at 101 [JA 141]. McKenzie's team leader, Sanders, also approached Walper to see if McKenzie could be promoted to the GS-13 grade level, Def.'s Ex. 11, Sanders Dep. at 17-18, but, according to McKenzie, Walper repeated that he could do nothing about McKenzie's situation. Def.'s Ex. 1, Pl.'s Dep. at 101, 106-07, 111-12 [JA 141- 45].

Walper's immediate supervisor, Kenneth Thomas, disagreed with Walper about promoting McKenzie. Pl.'s Ex. 7, Thomas Aff. at 10 [JA 114]. Indeed, Thomas believed that McKenzie could have been promoted to the GS-13 grade level if Walper had in fact recommended it to him. Id. According to Thomas, however, Walper never asked him about promoting McKenzie. Id. Thomas and Sanders then approached ITSS's Director of Information Technology and Administration, Lorraine Pertino, about the possibility of promoting McKenzie. Def.'s Ex. 10, Pertino Dep. at 29 [JA 151].

Upon looking into McKenzie's personnel file, Pertino informed Thomas and Sanders that McKenzie's career ladder ended at the GS-12 grade level and that the position description to which she had been assigned was "clearly marked 'no known promotion potential.' " Id. at 34 [JA 156]. Thus, according to Pertino, McKenzie would have to apply and compete for a GS-13 promotion. Id. at 45. From the time McKenzie became eligible for a GS-13 promotion in March 1995 until she filed her lawsuit in 1999, however, there was no GS-13 vacancy at ITSS for which McKenzie could have applied. Def.'s Ex. 1, Pl.'s Dep. at 101-04, 114; Def.'s Ex. 10, Pertino Dep. at 25. A GS-13 team leader position did become available after the commencement of McKenzie's lawsuit. Def.'s Ex. 1, Pl.'s Dep. at 113-14; Def.'s Ex. 10, Pertino Dep. at 25-26, 48. Although McKenzie applied for the position, ITSS awarded the job to Celeste Mathews, a black female. Def.'s Ex. 1, Pl.'s Dep. at 113-14; Def.'s Ex. 10, Pertino Dep. at 25-26, 48. McKenzie does not challenge Matthews's

promotion on appeal. Br. for Appellant at 3 n. 1.

II.

We analyze a sex discrimination claim under Title VII using the familiar burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under McDonnell Douglas, the plaintiff bears the initial burden of establishing a prima facie case of discrimination by a preponderance of the evidence. Id. at 802. If the plaintiff establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions. Id. If the employer meets its burden, the plaintiff must then demonstrate that the employer's stated reason was in fact a mere pretext for discrimination. Id. at 804. A plaintiff that offers only "mere speculation [ ]" to refute the employer's proffered legitimate, non-discriminatory reason, however, fails to create a genuine issue of material fact to avoid summary judgment. Brown v. Brody, 199 F.3d 446, 459 (D.C.Cir.1999).

Even assuming that McKenzie established a prima facie case of sex discrimination, the district court properly granted summary judgment to the defendant because McKenzie failed to raise a genuine issue of material fact as to whether the DVA's articulated reason for her non-promotion was pretextual. See McDonnell Douglas, 411 U.S. at 804. Specifically, McKenzie failed to provide any evidence undermining Pertino's testimony that, as a result of the DVA's reorganizations, a sufficient workload did not exist to warrant promoting McKenzie to the GS-13 grade level.

A.

On appeal, McKenzie emphasizes that she performs the same work that her GS- 13 male colleagues perform and that the DVA refused to grant her the promotion opportunity it had previously

afforded those men. These facts alone do not discredit, however, the legitimate, non-discriminatory reason proffered by the DVA, i.e., that its decision not to promote McKenzie to the GS-13 grade level stemmed from the structural reorganizations that had taken place within the department. According to Pertino, the female director of ITSS, the DVA did not give McKenzie the opportunity to compete for a GS-13 position because, at the time McKenzie became eligible to compete for such a position, the work performed by operations shift supervisors did not support the GS-13 grade level. Def.'s Ex. 10, Pertino Dep. at 52. Nothing in the record contradicts Pertino's testimony.

As the record makes clear, McKenzie's male colleagues obtained their GS-13 promotions *5 before the mid-1990s reorganizations, at a time when the work performed by operations shift supervisors supported a GS-13 grade level. Id. at 44. After the reorganizations, however, the DVA reduced ITSS's computing responsibilities and, as a result, the duties of each operations shift supervisor likewise diminished. Id. at 40. Although the operations shift supervisor position no longer supported the GS-13 grade level, ITSS did not demote those employees who had attained the GS-13 grade level before the reorganizations. Id. at 40, 44. Should a GS-13 employee choose to leave ITSS, however, the DVA would not replace the departing employee with another GS-13 employee, but instead either fill the position at a lower grade level or eliminate the position altogether. Id. at 44. Even McKenzie acknowledged that, if she departed ITSS, the DVA would likely phase out her current position. Def.'s Ex. 1, Pl.'s Dep. at 104. Accordingly, McKenzie failed to demonstrate that the DVA's articulated reason for her non-promotion was a mere pretext for sex discrimination.

B.

Contrary to McKenzie's assertions, Bland's transfer into ITSS did not undermine Pertino's testimony that, at the time McKenzie became eligible for a GS-13 promotion, the work performed by operations shift supervisors did not support the GS-13 grade level. Indeed, the record indicates that the DVA transferred Bland into ITSS before McKenzie became eligible for a GS-13 promotion in March 1995. In his February 24, 1998 affidavit, Bland stated that he had been working at ITSS for "the last three or four years." Pl.'s Ex. 8, Bland Aff. at 3. Bland further declared that, at the time of his transfer, Jeannie McCully served as ITSS division chief. [FN3] Id. Because McCully--by her own admission--left her position as ITSS division chief in November 1994, Bland had to have transferred into ITSS before November 1994, four months before McKenzie became eligible for a GS-13 promotion. Pl.'s Ex. 4, McCully Aff. at 6. Bland's transfer into ITSS thus failed to demonstrate that the DVA's legitimate, non-discriminatory reason for its non-promotion of McKenzie was pretextual.

FN3. In a deposition taken nearly two years after the date of his affidavit, Bland again testified that he had been working in his current position "three or four years." Def. Ex. 13, Bland Dep. at 5. Although Bland's response necessarily (because of the passage of time) conflicts with his earlier statement, Bland subsequently indicated in his deposition that McCully interviewed him for the ITSS position. Id. at 9. Because it is undisputed that McCully departed ITSS in November 1994, Pl.'s Ex. 4, McCully Aff. at 6, Bland's deposition testimony simply failed to account for the interval between his affidavit and his deposition.

No. CA 99-0257 (RCL).

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CAROLYN MCKENZIE, Plaintiff,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs, Defendant.

July 2, 2001.

MEMORANDUM OPINION

Now before the Court is a motion for summary judgment by the defendant, Anthony Principi, the Secretary of Veterans Affairs[1] and motions in limine by the defendant and the plaintiff, Carolyn McKenzie. Upon consideration of these motions and the supporting documents, the oppositions and replies thereto, the entire record and the relevant law, the Court grants defendant's motion for summary judgment, rendering the motions in limine moot.

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[1] The original complaint listed the former Secretary of Veterans Affairs, Togo D. West, Jr., as the defendant. After the presidential election, Anthony Principi took over in that capacity. This Court Will substitute Principi as the defendant. Texas Gray Panthers v. Thompson, 139 F.Supp.2d 66, 69 n.1 (D.D.C. 2001) (citing Fed. R. Civ. P. 25 (d) (1)).

BACKGROUND

On February 4, 1999, the plaintiff, Carolyn McKenzie filed a complaint against the defendant, the Secretary of the Department of Veterans Affairs, for Racial and Gender Discrimination in violation of Title VII. Plaintiff also sought relief from violations of the Equal Pay Act. On May 7, 1999, defendant sought to dismiss plaintiff's Equal Pay Act claim pursuant to Fed. R. Civ. P. 12(b) and 12(h). After the parties filed responses, the court granted defendant's motion or. March 3, 2000. On September 13, 2000, plaintiff filed a motion in limine to restrict the testimony of Joseph Walper from trial or in the dispositive motions. Defendant filed a response, and also sought to exclude the testimony of Dr. Paul Bone frog. trial. On October 2, 2000, after extensive discovery, defendant filed a motion seeking summary judgment for the Title VII violations. Plaintiff filed a response and the defendant filed a reply thereto.

Facts

In 1993, the Department of Veterans Affairs hired the plaintiff, Carolyn McKenzie (an African-American female), as a computer specialist at the GS-11 level.' Plaintiff's initial job was a career ladder position ending at the GS-12 level.[2] A career ladder position is one in which an employee is not required to compete with others to attain a promotion to the next GS level. On March 6, 1994, plaintiff was promoted to the GS-12 level with a target for the GS-13 level. A position that is targeted for another level requires the employee to compete for that promotion. Her new position title as a

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[2]The General Schedule (GS) is a pay system for clerical and white collar federal employees which is divided into 15 grades. Those grades are then subdivided into 10 steps. Each step of each grade is assigned a numerical value which is the annual salary a person at that grade and step earns.

GS-12 was Operations Shift Supervisor.

In the mid-1990's, the Department of Veterans Affairs underwent several reorganizations. During these reorganizations, the Department of Veterans Affairs switched from the "WANG" mainframe system to a "LAN network environment." As a result of these reorganizations, supervision for the new LAN network :roved from the Veterans Affairs Central Office ("VAC") in Washington, DC to the Austin Automation Center ("AAC") in Austin, Texas. However, the computer operations were transferred out of Austin and back to Washington, DC, effective January 5, 1997. These operations returned more streamlined and enhanced the quality of services provided to the Department of Veterans Affairs, but the department plaintiff worked in, the Information Telecommunications Systems Service ("ITSS")[3], was downsized. In fact, since the reorganizations, only 45 out of 100 employees remain in ITSS.

In 1994, before the reorganizations, plaintiff asked her original supervisor, Patricia McCully, for information on how to obtain a promotion to the GS-13 level. Plaintiff was told that she would have to apply and compete for the position, but at this time a job freeze existed. The practice at the ITSS was to post the job for all employees to compete, even if an incumbent was already doing that job at a lower GS level. 1f the incumbent failed tc win the promotion, he or she would be given different. job responsibilities. No promotions are granted without the competition process.

The other shift supervisors working ar the I'rss were all at the GS-13 level. Reginald Sanders (an African-American male) was promoted to the GS-13 level in 1993, a year before the reorganizations. Arthur Brooks (an African-American male) was also promoted before the reorganizations. Both went through the typical

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[3]The ITSS is the successor entity to the VAC.

competition process to obtain their promotions. Alan Band (an African-American male) was transferred to ITSS in 1994 or 1995 to replace Wade Wallace; previously he obtained the GS-13 level through the competition process in 1980 in another Department of Veterans Affairs department. A fourth employee, Andy Stasny (a Caucasian male), also previously went through the competition process to become a GS-13 shift supervisor; he already obtained the GS-13 level when plaintiff started to work at the Department of Veterans Affairs.

In March 1995, plaintiff completed her time-in-grade requirement and became eligible to compete for a promotion. After speaking to her supervisor, Joseph Walper, plaintiff was told by Walper that he was unable to promote her. Apparently, some type of either informal or formal personnel freeze still existed at ITSS to prevent the number of employees from being promoted. Plaintiff repeatedly asked Walper about Lhe possibility of a promotion, and Walper kept reiterating there was nothing he could do about it. Even Sanders, plaintiff's team laader and fellow shift supervisor, went to Walper to ask if a vacated GS-13 position could be given to plaintiff.

Later, Walper switched the shift hours of Bland and plaintiff. At that time, plaintiff was working nights, which paid a higher differential. Walper's rationale was he needed plaintiff's talents on day shift to accomplish more work. This action was approved by Walper's Supervisor, Kenneth Thomas. Thomas, however, felt plaintiff could be promoted if Walper recommended it to him. Thomas even stated that Walper never asked him about seeking a promotion for plaintiff. Thereafter, Thomas and Sanders spoke to Lorraine Pertino about the possibility of obtaining plaintiff a promotion to the GS-13 level

because a vacancy existed.[4] Pertino told them that plaintiff's position description ended at the GS-12 level, although she was tracked for a GS-13. Thus, plaintiff's position was not on a career ladder for GS-13, but she could apply and compete for the promotion.[5]

In fact, another employee, Wallace, whose career ladder would permit him to reach the GS-13 level, never obtained that status with the ITSS. He was transferred to another Department of Veterans Affairs office
before he could reach his time-in-grade requirements for this ladder promotion; Bland became his replacement.

Moreover, only one other employee, Celeste Mathews (an African-American), was actually promoted to the GS-13 level after the mid-1990's reorganizations. Many employees applied for this new position, including plaintiff, and even plaintiff conceded Mathews deserved the job. However, no formal action was taken in the Department of Veterans Affairs (not the ITSS) to reduce the amount of GS-13's, but only the GS-14's and 15's. Yet if a position was transferred out of ITSS, its role would not be filled by ITSS anymore; another agency within the Department of Veterans Affairs would assume that responsibility.

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[4]Pertino was the Director for Information Technology and Administration. In terms of the hierarchy at ITSS, Pertino directly supervised Thomas, who directly supervised Walper, who directly supervised Sanders and plaintiff.

[5]Both plaintiff and defendant spend considerable time eschewing the particulars of plaintiff's job description to determine if plaintiff, as a GS-12, was actually doing the same work as the GS-13 supervisors. For the purposes of this motion, this Court will presume she had.

ANALYSIS

The plaintiff, who fails to show any similarly situated male employees who were promoted to the GS-13 level, cannot sustain a Title VII gender discrimination claim. Plaintiff also fails to show any non-African-American employees who were promoted to the ,35-13 level instead of the plaintiff. Finally, plaintiff's and the Department of Veterans Affairs's motions *in limine* are rendered moot by the disposition of this case.

"Summary Judgment may be granted when the pleadings and evidence demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Childers v. Slater, 44 F.Supp. 2d 8, 14 (D.D.C. 1999) (citing Fed. R. Civ. P. 56(c); Celotex v. Catrett, 477 U.S. 317, 322 (1986)). The evidence is "viewed in the light most favorable to the nonmoving party." Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1288 (D.C. Cir. 1998) (en bane) (citing Tao v. Freeh, 27 F.3d 635, 638 (D.C. Cir. 1994). "The nonmoving party may not rest on mere allegations, 'but must come forward with specific facts showing there is a genuine issue for trial.'" Childers, 44 F.Supp. 2d at 15 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). While "a plaintiff's discrediting of an employer's stated reason is entitled to considerable weight," Aka, 156 F.3d at 1295; the plaintiff must do more than create "a weak issue of material fact as to whether the employer's explanation is true." Id. at 1291. Presenting affidavits and other evidence, and not mere allegations in the pleadings, is necessary to defeat a summary judgment motion. Crenshaw v. Georgetown Univ., 23 F.Supp. 2d 11, 15 (D.D.C. 1998) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986)).

Shifting Burdens of Proof

The Supreme Court has delineated a three part framework for handling Title VII claims. First, the plaintiff must establish a prima facie case, usually by showing, among other things (1) membership in a statutorily protected group; and (2) an adverse employment action Taken against her. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The burden then shifts to the defendant, who has an opportunity "to articulate some legitimate, nondiscriminatory reason" for the adverse employment action. Id. Finally, the burden shifts back to the employee, who is permitted an opportunity to show the defendant's stated reason is pretextual. Id. at 804.

Gender Discrimination

The Department of Veterans Affairs is entitled to summary judgment on the Title VII gender discrimination claim because plaintiff cannot sustain a *prima facie* case by showing employees outside the protected class received promotions after the reorganizations. Even if plaintiff does make a prima facie case, she can not rebut the Department of Veterans Affairs's legitimate non-discriminatory business reason, the reorganizations, by presenting mere allegations of ITSS's promotion structure.

Prima Facie Case

Plaintiff, who fails to present evidence of employees outside the protected class who received promotions after the reorganizations, cannot make a *prima facie* case of gender discrimination. "[T]o make out a *prima facie* case the plaintiff must show (1) that she belongs to a protected group, (2) that she was qualified for and applied for a promotion, (3) that she was considered for and denied the promotion, and (4) that other employees of similar qualifications who were not members of the protected group were indeed promoted at the time the

plaintiff's request for promotion was denied." Bundy v. Jackson, 641 F.2d 934, 951) (D.C. Cir. 1981) (citing Kunda v. Muhlenberg Coll., 463 F.Supp. 294, 307 (E. D. Pa. 1978) (emphasis and numerals added); see also Cones v. Shalala, 199 F.3d 512 (D.C. Cir. 2000) (explaining Bundy still applies in cases where the employee is denied an increase in pay or grade); Johnson v. Brock, 810 F.2d 219, 223 (D.C. Cir. 1987).

In Bundy, the plaintiff became eligible for a promotion in January 1975, yet she was not promoted until July 1976. Bundy, 641 F.2d at 949. The plaintiff was told a job freeze was in effect, yet other male employees were promoted. Id. In addition, Bundy lost a further promotion to a male because of the age of clients that she worked with. Id. at 949-50. While the court did not reach the merits of the plaintiff's claim, it did remand and add

> On the other hand, there can be no absolute precise and uniform time period before and after the denial of the complainant's promotion during which plaintiffs must show that similarly qualified nondisadvantaged [sic] employees were promoted. But a court can certainly determine a reasonable period on the facts of a particular case.

Id. at 951; but Cf. Nayar v. Howard University, 881 F. Supp. 15, 20 (D.D.C. 1995) (holding the university cannot claim the time period for the denial of tenure is one year because "a University could discriminate against female, Indian professors with impunity as long as the University ensured that no other professors in the department who were in a non-protected class were considered for tenure the same year.").

Here, the reorganizations signaled a large change in the way ITSS ran their business, Functions were streamlined, and TTSS

improved the quality of their services while reducing the number of personnel. (Def.'s Ex. 8). Even the plaintiff, in her deposition, states that ITSS has reduced the number of employees drastically. (Def.'s Ex. 1, Pl. Dep. at 133). Furthermore, employees whose jobs were transferred would not be restaffed by ITSS. (Def.'s Ex. 10, Pertino Dep. at 20). Even plaintiff admits her job would be phased out if she left ITSS. (Def.'s Ex. 1, Pl. Dep. at 109). Thus, events occurring before these structural reorganizations relating to promotions fall outside the reasonable period of time and do not indicate a discriminatory motive.

A failure to provide any "evidence at all that any fellow supervisor (or anyone else beneath her at it the [company's] hierarchy) was promoted to a manager position after the reorganization" is "fatal to (an employee's] failure to promote claim." Kee v. NEC Technologies, Inc., No. 95 C 3313, 1996 WL 559953, at *4 (N.D. Ill. 1996); Cf. Holbrook v. Reno, 196 F.3d 255, 261 (D.C. Cir. 1999) ("A plaintiff must also demonstrate that all relevant aspects of her employment situation were nearly identical to those o the male employee" to prove rhaz she is similarly situated) (citing Nueren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507, 1514 (D.C. Cir, 1995)) (internal quotations and citations omitted) (emphasis added).

In Kee, the plaintiff was a supervisor and O'Brien was a manager (a higher position) before the reorganization. Kee, 1996 WL 559953, at *4. After the reorganization, O'Brien moved latterally to become the plaintiff's manager, without receiving a pay raise. Id. In fact, "O'Brien's position remained unchanged other than trading [her] previous managerial responsibilities for a different set of responsibilities." Id. Furthermore, no other employee was even considered to receive a managerial promotion. Id. The court decided these failures were fatal to the plaintiff's presentation and she could not sustain a *prima facie* case.

Id.

Here, plaintiff did not become eligible for promotion until after the reorganizations in March 1995.[6] (Def.'s Ex. 1, Pl. Dep. at 98). Moreover, the four employees plaintiff cites as evidence of discrimination achieved the GS-13 level before the reorganizations.[7] (Def.'s Ex. 10, Pertino Dep. at 38-Yli; Def.'S Ex. 13, Bland Dep. at 6; Def.'s Ex. 1, Pl. Dep. at 122). Therefore, because these four employees all completed their time in grade and promotion competition before the reorganizations they fall outside the reasonable time period and can not be considered as similarly situated.

A complainant must show non-protected class members were promoted during the time a plaintiff became eligible for the

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[6]Plaintiff, for the purposes of this :notion, satisfies the other criteria necessary in a failure to promote case. First, she is a woman, thus is a member of a statutorily protected class. This Court will also presume that plaintiff was qualified for the promotion, although both sides contest the details of plaintiff's job responsibilities. In addition, while plaintiff did not formally apply for a promotion became she was not able to, she did indicate her desire to be promoted repeatedly. Finally, plaintiff was denied a promotion.

[7]Plaintiff alleges that Bland was brought in from another department, thus denying plaintiff a chance to receive that position. However, Bland has been a GS-13 since 1.980, and he joined the ITSS during the reorganizations, before plaintiff completed her time-in-grade at GS-12, much like O'Brien in Kee. (Def.'s Ex. 13, Bland Dep. at 6, 3).

promotion to make a *prima facie* case. Freeman v. Lewis, 675 F.2d 398, 401 (D.C. Cir. 1982). In Freeman, the defendant promoted only one other person once the plaintiff became eligible, and that person was in the plaintiff's class. Id. "Thus, plaintiff has clearly failed requirement # 4 here." Id. Therefore, the plaintiff, if she could not prove otherwise, would fail to make a or-i-na facie case and the matter would be dismissed on remand.[8] Id. at 402; see also Miller v. Meese, No. Civ. A. 79-2405, 1588 WL 34939, at * 5 (D.D.C. April 8, 1988) ("[T]he ultimate recipient of that promotion was a similarly or better qualified back individual; therefore as a matter of law he cannot satisfy the fourth prong of Bundy"); Ferguson v. E.I. duPont de Nemours and Co., 560 F.Supp. 1172, 193 (D. Del. 1983) (concluding employer's practice of promoting members of the protected class eliminated part of the plaintiff's *prima facie* case); but Cf. Shepard v. Adams, 670 F.Supp. 22, 26 (D.D.C. 1987) (stating plaintiff raised an issue of fact by showing she was not allowed to acquire new duties and had to wait for she time-in-grade while similarly situated non-protected class members were given these benefits); Altschuler v. Walters, No. 82-2527, "-983 WL 558, at *'C (E.D. Pa. August 22, 1983) (allowing plaintiff to proceed to trial even

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[8]The Freeman court also noted serious questions existed with requirement # 2 of Bundy. Freeman, 675 F.2d at 402. First, the plaintiff probably failed to apply for any further promotions. Id. at 401. In addition, while she did eventually receive the GS-12 promotion, the plaintiff had to show it was at a "slower than the rate at which members outside her class were promoted." Id. at 403, Even if she was promoted more slowly, the plaintiff would have to show it was not from a lack of qualifications. Id. at 402 (citing Aikens v. United States Postal Serv. Bd. of Governors, 665 F.2d 1057, 1059-60 (D.C. Cir. 1981). Here, because this Court, for purposes of this motion, has concluded plaintiff was qualified, this factor will not be resolved.

though no other employees were promoted because the members similarly situated outside of plaintiff's class were given an accretion of duties).

In this case, the one employee who could be construed as similarly situated was Celeste Mathews. She was the only employee promoted to the GS-13 level after the reorganizations. (Def's Ex. 1, Pl.'s Dep. at 114; Def.'s Ex. 10, Pertino Dep. at 25). Plaintiff did apply for this job, yet she even conceded that Mathews was a good employee and deserved the position. (Def.'s Ex. 1, Pl.'s Dep. at 115). Mathews, though, is in the same protected class as plaintiff. In addition, plaintiff was given a chance to acquire more responsibilities as a GS-12 by being given Shift Supervisor tasks. (Id. at 101). Therefore, these action do not indicate plaintiff was discriminated against on the basis of her sex.

Plaintiff also fails to raise an issue by alleging she was not given an opportunity to compete for a promotion in the same manner her colleagues at the GS-13 level were. Plaintiff claims that once the incumbent completes the time-in-grade for the position, they obtain a chance to compete for it, and they always win. She cites Bland, Sanders, and Brooks as three employees who received this opportunity. However, these promutions all occurred before the reorganizations, thin they are hardly indicative of the current business environment at ITSS. Moreover, a procedure existed to give the incumbent different job responsibilities if he or she failed to win the promotion. (Pl.'s Ex. 2, McCully Dep. at 25). More critically, plaintiff fails to present any evidence, anywhere, that the incumbent always won the promotion. No statistics or any other relevant data is presented to show incumbents always won the promotion competition, especially after the reorganizations.

Finally, plaintiff's allegation that her supervisor, Walper, only

needed to go ask his supervisor, Thomas, to post her promotion, thus giving plaintiff an opportunity to compete for it is unfounded. (Pl.'s Ex. 7, Thomas Aff. at 10). Thomas's supervisor, Pertino, stated plaintiff did not warrant a promotion to GS-13 in her current position. (Def.'s Ex. 10, Pertino Dep. at 52). Pertino also added that plaintiff did not have promotion potential to become a GS-13. (Id. at 34). Therefore, the only way for plaintiff to receive a promotion was to compete for one when it became available, and win it, much like Mathews.[9]

Pretext

Even if plaintiff makes a *prima facie* case of gender discrimination, plaintiff is unable to discredit the Department of Veterans Affairs's legitimate business reason for non promotion-the reorganizations-simply by citing her coworkers' unsubstantiated opinions of plaintiff's qualifications and ITSS's promotion structure. Offering "nothing beyond . . . speculations and allegations to refute

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[9]Plaintiff also cites three other instances of discrimination. First, Thomas claims he heard Walper tell sexist jokes. (Pl.'s Ex. 7, Thomas Aff. at 11). Sanders then claims that he never saw Walper give Thomas her cash award. (Pl.'s Ex. 10, Sanders Dep. at 11). Both of these claims, by themselves, are not enough to indicate an action so pervasive to indicate one is inclined to discriminate in promoting. Finally, plaintiff states Walper intentionally switched her from night to day so Bland could receive the higher pay differential. Yet Thomas, plaintiff's strongest supporter, stated Walper switched her to days because he needed her talents there, and Thomas approved that move. (Pl.'s Ex. 7, Thomas Aff. at 5). Therefore, it seems incongruous that this action would be motivated by discrimination while a higher supervisor who supported plaintiff had to approve it.

the [defendant's] legitimate nondiscriminatory reasons for its decisions" does not create a genuine issue of material fact to avoid summary judgment. Brown v. Brody, 199 F.3d 445, 458-59 (D.C. Cir. 1999).

A failure to produce evidence that may "buttress her evidence of pretext" prevents the court frcm making an inference of pretext. Barbour v. Browner, 181 F.3d 1342, 1347 (D.C. Cir. 1999). There, the plaintiff made a *prima facie* case in front of a jury, yet the appeals court concluded this prima facie case was extremely weak. Id. Barbour's only "evidence of bias is the apples-and-oranges comparison she draws between herself and Peterson, which we rejected above." Id. The court concluded, "Because that evidence standing alone has virtually no probative value, we conclude that the district court should have granted the EPA's motion for judgment as a matter of law." Id. See also Barbour v. Merrill, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (stating evidence must be presented to show an inference of pretext); Thorne v. Alexander, 782 F.Supp. 677, 680 (,D-D.C. 1992; (explaining a plaintiff must offer "more than a mere scintilla of evidence that these reasons were a pretext for discrimination.").

Here, the plaintiff only produced the statements of employees such as Sanders and Thomas to allege that the nonpromotion was motivated by discrimination, and not. the reorganizations. (Pl.'s Ex. 7, Thomas Aff. at 7.C-11; Pl.'s Ex. 5, Sanders Aff. at 5-6). Yet Thomas's supervisor, Pertino, sated plaintiff did not warrant a promotion to GS-131 in her current position. (Def.'s Ex. 10, Pertino Dep. at 52). Additionally, Pertino stated that plaintiff did not have promotion potential to become a GS-13. (Id. at 34). Therefore, plaintiff could only receive a promotion by competing for one.

Even if the Court concludes these allegations are enough tc support plaintiff's claim, she still fails to present enough evidence

showing Department of Veterans Affairs's rationale for non-promotion was pretextual. First, no evidence is shown that the incumbent always wins the job, except for mere allegations and conclusory analysis. Moreover, vast numbers of employees at all levels were phased out at 1TSS. (Def.'s Ex. 1, Pl. Dep. At 136-140; Def. 's Supp. Mem. Ex.). Finally, only one other person after the reorganizations received a promotion, Celeste Mathews. Based on these facts, no rational jury could conclude the Department of Veterans Affairs's legitimate, non-discriminatory business reason for non-promotion was pretextual. While it is unfortunate that plaintiff seems stuck at the GS-12 level at work, it is not for this Court to decide how the Department of Veterans Affairs should run its operations.

Racial Discrimination

Plaintiff also fails to show any non-African-American employees who were promoted to the GS-13 level instead of the plaintiff. "[T]o make out a prima facie case the plaintiff must show (1) that she belongs to a protected group, (2) that she was qualified for and applied for a promotion, (3) that she was considered for and denied the promotion, and (4) that other employees of similar qualifications who were not members of the protected group were indeed promoted at the time the plaintiff's request for promotion was denied." Bundy v. Jackson, 641 F.2d 934, 951) (D.C. Cir. 1981) (citing Kunda v. Muhlen'oerg Coll., 463 F.Supp. 294, 307 (E. D. Pa. 1978) (emphasis and numerals added); see also Cones v. Shalala, 199 F.3d 512 (D.C. Cir. 2000) (explaining Bundy still applies in cases where the employee is denied an increase in pay or grade); Johnson v. Brock, 810 F.2d 219, 223 (D.C. Cir. 1987).

Here, the plaintiff cites four other employees who were promoted to the GS-13 level: Bland, Sanders, Brooks, and Szasny. Only Stasny is white; the other three are African-American, and

Stasny was not similarly situated. Infra, at 12. Furthermore, the one person who was promoted to the GS-13 level after the reorganizations, Celeste Mathews, is also an African-American. Therefore, no rational jury could conclude racial discrimination occurred and this claim will be dismissed.[10]

Motions in Linine

The motion *in limine* filed by the plaintiff to exclude the testimony of Joseph Walper from trial is now moot because this Court has granted summary judgment.[11] The defendant's motion *in limine* seeking to exclude the testimony of Dr. Paul Bone is now moot as

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[10] "The racial discrimination claim filed by the plaintiff is utterly frivolous. The facts are so clear on this issue, one questions why it was even brought up. The people who plaintiff alleges to be similarly situated are almost all of the same race.

[11] Plaintiff urges the court not to consider Walper's testimony in this dispositive motion. She claims the Department of Veterans Affairs has kept changing the dates of the deposition because of Walper, and then would not allow the plaintiff to depose him because the time for discovery has passed and defendant's wanted to depose another individual. Plaintiff, however, may have filed a motion to this Court to compel the deposition or in the alternative, extend the time for discovery. Plaintiff has done neither, and seeks at th-s point to limit the testimony of Walper. Therefore, this Court chooses to deny the motion in limine. In any event, the affidavit of Walper is of little evidentiary value and has not been considered by this Court in the disposition of the case.

well. See generally, Neal v. Brown, 980 F.2d 741, 748-49 (D.C. Cir. 1992) (per curiam); Penthouse Int'l, Ltd. v. Meese, 939 F.2d 1011, 1019 (D.C. Cir. 1991).

CONCLUSION

For the foregoing reasons, the Court GRANTS the defendant's motion for summary judgment, rendering the motions *in limine* MOOT.

A separate order shall issue this date.

ROYCE C. LAMBERT
UNITED STATES DISTRICT JUDGE

Date: 7-2-01